COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1407

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

THE FALK CORPORATION,

PLAINTIFF-RESPONDENT,

V.

BASIL E. RYAN, JR., D/B/A
VEHICLE TOWING COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Basil E. Ryan, Jr., appeals from a money judgment entered against him based on orders finding him in contempt. The trial court found that Ryan had violated an amended judgment entered as a result of earlier litigation between Ryan and the Falk Corporation.

Ryan contends that the trial court erroneously interpreted the amended judgment without balancing the parties' respective interests and imposed additional restrictions not contained in the amended judgment and not addressed by the parties in the earlier trial. Ryan also contends that the trial court's findings of fact were not supported by the evidence. Ryan also challenges the trial court's application of the amended judgment's requirement that the parties pursue alternative dispute resolution before returning to court to enforce their respective rights in an easement. By motion and in its brief, Falk Corporation contends that the appeal is frivolous and asks this court to order Ryan to pay attorney's fees. We affirm the judgment, but we conclude that the appeal is not frivolous and deny Falk's motion.

BACKGROUND

The dispute between the parties centers on a thirty-foot roadway across property Ryan owns and which Falk has the right to use for ingress and egress.[1] This is the parties' second appearance in this court. The earlier appeal was from a judgment declaring Falk's rights in the easement, and the underlying facts are set forth in that decision. *See* ***Falk Corp. v. Ryan***, No. 94-3034 (Wis. Ct. App. Oct. 24, 1995). The trial court entered an amended judgment pursuant to a directive in our prior decision.

The amended judgment prohibits the installation of additional fences or gates at any location along the roadway. With regard to parking, the amended judgment in effect divided the roadway into three sections. It prohibited all

[1] Figure 1, attached to this opinion as an exhibit, shows the properties involved in this appeal.

parking in the section at the western end of the roadway. It permitted temporary parking in the second section, which is in the western half of the roadway. Temporary was defined "as during ordinary business hours of one day or less." Parking in the third section, which is the remainder of the easement and the part abutting Falk's property, was not specifically addressed. In addition, the amended judgment specifically permitted obstruction or blockage of the roadway for periods up to one hour if the blockage was the result of using the roadway for its intended purpose. The one-hour time limit was added pursuant to the mandate from the earlier appeal. Also relevant to this appeal is a provision requiring the parties to use alternative dispute resolution before seeking enforcement or relief from the amended judgment.[2] Additional facts will be set forth as necessary.

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[2] The actual language of the amended judgment was as follows:

> 3. The installation of any additional fences or gates at any location along the [r]oadway is prohibited. The legal description of the subject real estate and [r]oadway is attached hereto and incorporated by reference.
>
> 4. Parking in the first 15 feet east of the west edge of the Valley Business Center building, which adjoins the northerly boundary of the [r]oadway is prohibited.
>
> 5. Temporary parking along the Valley Business Center building and fence that commences 15 feet east of the west edge of the building is permitted. "Temporary" is defined as during ordinary business hours of one day or less.
>
> 6. Standing or parking of vehicles on the [r]oadway for periods of up to one hour, while using it for its intended purposes, is permitted, notwithstanding that some obstruction or blockage may occur on the [r]oadway.
>
> ….
>
> 8. Pursuant to § 802.12, the parties are ordered to use one of the prescribed [alternative-dispute-resolution] mechanisms contained in § 802.12 prior to seeking enforcement or relief for violation of the court's order.

LEGAL STANDARDS

A court has the power to impose remedial contempt to obtain compliance with its orders. *See* §§ 785.01(3) and 785.02, STATS. We review the trial court's use of its contempt power under the standard of erroneous exercise of discretion. ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis.2d 1, 23, 539 N.W.2d 916, 924 (Ct. App. 1995). Before finding a party in contempt, the trial court must determine that the violation was intentional, *see* § 785.01(1), STATS., and was within the party's control, *see* ***Town of Seymour v. City of Eau Claire***, 112 Wis.2d 313, 318, 332 N.W.2d 821, 823 (Ct. App. 1983). Additionally, there must be a court order or decree that clearly and specifically prohibits the challenged behavior. ***Stotler & Co. v. Able***, 870 F.2d 1158, 1163 (7th Cir. 1989); ***D. Patrick, Inc. v. Ford Motor Co.***, 8 F.3d 455, 460 (7th Cir. 1993).

If the underlying facts in the contempt proceeding are disputed, we will not set aside the trial court's factual determinations unless they are clearly erroneous. ***Dells Fireworks***, 197 Wis.2d at 23, 539 N.W.2d at 924. If the contempt finding involves an interpretation of the prior order, however, we review the trial court's interpretation *de novo*. ***Id.***

PARKING ALONG FALK'S PROPERTY

The present dispute arose in February following entry of the amended judgment. Claiming an emergency existed, Falk obtained a show-cause order against Ryan. Falk alleged that Ryan was parking vehicles for multiple days in the area limited to temporary parking. Falk also alleged that Ryan was parking some vehicles at an angle, thereby blocking the roadway where it abutted Falk's parking lot. In addition, Falk alleged that Ryan was storing two buses at the far

east end of the roadway. Falk represented that these activities created an unreasonably dangerous situation necessitating a prompt hearing.

By the day of the show-cause hearing, all offending vehicles had been removed except the buses. Ryan testified that the owners of the offending vehicles, not his towing business, were responsible for the long-term parking. He testified that he was required to return vehicles to individuals who reclaimed them from his lot even if they were not operable. According to Ryan, in those situations owners often left the vehicles where they would not be ticketed, including on the roadway, until the owners could move them elsewhere. Ryan testified that during the time period Falk complained of, a larger number of vehicles were temporarily disabled by extremely cold weather, which had moderated by the time of the hearing.

The trial court rejected Ryan's testimony regarding his lack of responsibility for the long-term parking on the western portion of the roadway. The court stated that the credibility of his testimony was undermined by the timing of the removal of the offending vehicles and by evidence that Ryan had moved some of the vehicles allegedly left on the roadway. The court also stated that its intent had been to prohibit any parking in the roadway, except where temporary parking was expressly allowed. The court concluded that Ryan had clearly and intentionally violated the amended judgment. The court granted Falk damages, measured by the cost of the additional employee time needed to maneuver around the cars parked at an angle and by attorney fees. The court also ordered Ryan to remove the buses stored on the east end of the roadway within ten days or face a forfeiture of five hundred dollars per day. The court did not, however, impose sanctions for the vehicles left for extended periods in the temporary parking area.

Ryan contends that the evidence did not support the finding of contempt regarding cars parked in the area limited to temporary parking. The trial court, however, did not accept Ryan's testimony that the vehicle owners, and not Ryan, were to blame for this violation of the amended judgment. Decisions on the credibility of witnesses and the weight to be given to testimony are for the fact-finder. *See* ***Sumnicht v. Toyota Motor Sales U.S.A., Inc***., 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). Thus, we must accept the trial court's findings.

Ryan also contends that the amended judgment does not prohibit parking adjacent to Falk's property. The crux of this claim is that the amended judgment did not specifically delineate the parties' rights with respect to this section of the easement. Ryan argues that parking adjacent to Falk's parking lot and at the east end of the roadway was not clearly prohibited and that the court's finding of contempt had the effect of extending the amended judgment to new issues not addressed by the evidence at the prior trial.

While we agree that the amended judgment does not specifically identify the third section of the roadway and set forth restrictions on parking, we reject Ryan's claim. The amended judgment has a general provision that permits blocking or obstructing the roadway for periods of up to one hour. This provision does not contain any geographic description limiting its application to a particular portion of the roadway. Because it covers the entire easement, it applies to the sections of the roadway abutting Falk's property. Any parking on the easement partially obstructs the roadway; therefore, parking is limited to one hour unless another provision of the amended judgment provides otherwise. Ryan violated this

provision with the buses that blocked half of the eastern end of the roadway and with the cars parked so that they jutted into the roadway.[3]

POLES INSTALLED ALONG EDGE OF ROADWAY

As previously noted, the amended judgment prohibited the installation of additional fences or gates at any location along the roadway. On the day of the first show-cause hearing, Ryan had eleven ten-foot poles placed at approximately twenty-foot intervals along the northern edge of the roadway. Four poles directly blocked access to Falk's parking lot and were immediately removed after Falk protested. Photographs included with the record show "no parking" signs posted on some, but not all, poles.

When the parties could not agree on whether the remaining poles should be removed while they negotiated over Ryan's right to install them, Falk obtained a show-cause order directing removal of all poles pending a hearing on the matter. The hearing was scheduled for six days later; and the order was served on Ryan the day after it was obtained. When the poles were not immediately removed, Falk obtained a second show-cause order based on Ryan's failure to comply with the directive to remove the poles. The poles were removed one or two days before the hearing.

Without taking testimony, the trial court ruled that the installation of the poles was a clear violation of the amended judgment, that it was planned at the

[3] Ryan argues that the application of the amended judgment should be limited by the issues and evidence presented at the earlier trial. To do so would change the focus of the appeal from whether his actions violated the terms of the amended judgment to whether the language of the amended judgment was consistent with the evidence at trial. He appeals from the judgment based on the trial court's findings that he was in contempt, not from the amended judgment. Thus, the appeal is determined by the language of the amended judgment as entered.

earlier hearing, and that it evidenced Ryan's willful disregard of the trial court's prior orders. The trial court's subsequent order stated that the prohibition on additional fences and gates in the amended judgment "prohibits the construction of everything, including but not limited to gates, fences, dividers, railings and fence posts, along the northern edge of the" roadway. The court admonished Ryan that any construction must first be negotiated with Falk.[4] Falk was granted compensation for attorney's fees resulting from this contempt proceeding. Ryan's motion to reconsider was denied without further hearing.

Ryan contends that he did not intentionally violate the order to remove the poles because the order did not contain a deadline. He argues that he was entitled to a reasonable time within which to comply with the directive and that the court should have heard evidence on the issue of whether his efforts to comply were reasonable. We reject this argument.

The purpose of a directive to take or not take action pending a hearing is to preserve the status quo until a hearing can be conducted on the movant's request for relief. *See* ***Major v. Sowers***, 297 F.Supp. 664, 666 (E.D. La. 1969). The status quo to be preserved, however, is the status that preceded the pending controversy, *see* 43 C.J.S. *Injunctions* § 9 (1978), and preserving it may require a respondent to take affirmative action to undo the act at issue, *see* ***Major***, 297 F.Supp. at 666 & n.6. Here, removal of the poles was necessary to return the roadway to the condition existing before Ryan installed them. Thus, each day of delay was a delay in restoring the status quo.

[4] Ryan raises the issue of whether the trial court improperly expanded the amended judgment by requiring him to submit the issue to alternative dispute resolution. We address this issue in the next section.

It is well settled that orders of the court are to be complied with promptly. ***Maness v. Meyers***, 419 U.S. 449, 458 (1975); ***Carlucci v. Piper Aircraft Corp.***, 775 F.2d 1440, 1448 (11th Cir. 1985). Ryan apparently had the means to comply readily available to him because he ultimately used his own equipment to remove the poles. A delay of three or four days when he could immediately comply is not prompt. Consequently, there was no need for an evidentiary hearing.

Ryan also contends that the installation of the poles was not prohibited by the language of the amended judgment. He first raises this issue in his reply brief, and we do not consider issues raised for the first time in the reply brief. *See* ***Rychnovsky v. Village of Fall River,*** 146 Wis.2d 417, 424 n.5, 431 N.W.2d 681, 684 n.5 (Ct. App. 1988).

USE OF ALTERNATIVE DISPUTE RESOLUTION

As previously noted, the amended judgment required the parties to attempt to resolve their differences through alternative dispute resolution before resorting to the courts to enforce the amended judgment. Ryan has two objections to the court's application of this provision.

First, Ryan contends that Falk violated the provision by seeking the show-cause order with regard to the vehicles parked in the roadway. Falk sought the show-cause order without first attempting alternative dispute resolution. Falk justified its action by alleging that an emergency existed that required immediate relief. Ryan argues that the evidence contradicts the claim of an emergency. The trial court did not make a factual determination regarding whether an emergency existed. Rather, the court acknowledged that an allegation of an emergency, if

accepted by the court, made the alternative-dispute-resolution provision unworkable. We see no error in the trial court's position.

Second, Ryan contends that the trial court's admonishment that he could not construct anything along the northern edge of the roadway without first submitting it to alternative dispute resolution impermissibly gives Falk a right of first refusal concerning Ryan's use of the easement. This claim is also without merit.

The purpose of the alternative-dispute-resolution provision is to allow the parties to informally resolve their differences over the use of the roadway. As we pointed out in our earlier opinion and as Ryan argues in his brief, Ryan retains the right to use the property, provided he does not interfere with Falk's use of the easement for its intended purpose. *See* ***Wisconsin Tel. Co. v. Reynolds***, 2 Wis.2d 649, 652, 87 N.W.2d 285, 287 (1958). If Falk objects to a proposed use on the grounds that it will interfere with use of the easement and the parties cannot resolve the dispute, the courts will still be called upon to balance the competing interests. The purpose of requiring Ryan to utilize the alternative-dispute-resolution mechanism before commencing a new use is to allow the parties to negotiate mutually agreeable terms for the proposed use before they come to court locked into "either/or" postures. The alternative-dispute-resolution mechanism does not deprive Ryan of his right to resort to the courts if Falk will not agree to his proposal, but it does prohibit him from acting unilaterally without first seeking Falk's agreement. In light of the apparent lack of co-operation between the two parties, the goal of negotiated resolutions to their disputes is probably quixotic.

FRIVOLOUS APPEAL

By motion and in its brief, Falk asks this court to find Ryan's appeal frivolous and to award it attorney fees pursuant to RULE 809.25(3)(c)2, STATS. Falk argues that Ryan and his attorney knew or should have known the appeal was without a reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* ***id.*** We address the issue as a matter of law based on Ryan's appellate arguments. *See* ***Vierck v. Richardson***, 119 Wis.2d 394, 399, 351 N.W.2d 169, 172 (Ct. App. 1984). We conclude that the question of whether the amended judgment prohibited parking adjacent to Falk's property was one about which competent attorneys and litigants could reasonably disagree. Our rejection of Ryan's arguments does not make them frivolous.[5] We deny the motion.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

[5] A comment about Falk's brief is required. It was wholly inadequate to assist this court in resolving the issues raised by Ryan. The only citations to authorities in Falk's brief related to the standards of review. Falk's responses to Ryan's specific arguments were one-sentence-to-two-paragraph criticisms of Ryan. Falk made no pretense of addressing the legal authorities relied on by Ryan or of discussing the legal standards governing a trial court's finding of contempt. Had an appellant filed such an inadequate brief, this court would have been justified in affirming for lack of argument and citation to legal authorities. *See* RULE 809.19(1)(e) and (3)(a), STATS.; ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dept.***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (court of appeals declines to address inadequately briefed issues). Reversal because a respondent fails to present an adequate argument, however, unfairly affects the trial court. Therefore, it was left to this court, without assistance from Falk, to undertake the research necessary to resolve the appeal. This court cannot continue to function at its current capacity without requiring compliance with the rules of appellate procedure, the purpose of which is to facilitate review. *See* ***Cascade Mountain, Inc. v. Capitol Indemn. Corp.***, 212 Wis.2d 265, 270 n.3, 569 N.W.2d 45, 47 n.3 (Ct. App. 1997).

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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